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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT NIBLETT, Defendant and Appellant.	B205293 (Los Angeles County Super. Ct. No. PA056224)

APPEAL from a judgment of the Superior Court of Los Angeles County, Harvey Giss, Judge. Modified and, as so modified, affirmed.

Cannon & Harris and Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant and appellant Robert Niblett was convicted on three counts of committing a lewd act upon a child (Pen. Code, § 288, subd. (a)), two counts of forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1)), and one count of forcible rape (Pen. Code, § 261, subd. (a)(2)). Defendant was sentenced to state prison for a total of 70 years to life.

On appeal, defendant contends the trial court: (1) abused its discretion in admitting pornographic and sexually explicit images; (2) had the sua sponte obligation to instruct that the images were admitted for a limited purpose; (3) violated Evidence Code section 352 by admitting other crime evidence; (4) committed misconduct by intervening in the examination of defense witnesses and aligning itself with the prosecution; (5) erred in issuing a no contact order; (6) violated his constitutional rights by imposing the upper term on count three; and (7) improperly imposed a restitution fine and a DNA penalty assessment. We hold that the no contact order must be stricken with regard to one victim and modified as to others. We also hold that the DNA penalty assessment fine was improperly imposed and must be stricken. In all other respects, we affirm the judgment, as modified.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts.*

Andrew O. lived with his twin brothers Angel O. and Anthony O., their mother Donna, his half-sister S.N., a baby half-brother, and Donna's second husband. Defendant is Donna's older brother and uncle to Andrew, Angel, Anthony, and S.N.

I.H. is defendant's sister; she is seven years younger than defendant.

The convictions involve defendant's sexual abuse of four victims, Angel, Anthony, Andrew, and S.N. Additionally, there was evidence that defendant sexually abused I.H.

(1) *Angel O.* (count one, Pen. Code, § 288, subd. (a), lewd act upon a child). When Angel was five to six years old, he was lying on the floor in his apartment watching television. Defendant came into the room, pulled Angel's pants and underwear down and put his mouth on Angel's penis.

(2) *Anthony O.* (count two, Pen. Code, § 288, subd. (b)(1), forcible lewd act upon a child). Sometime after Anthony's eighth birthday, Anthony fell asleep watching television in defendant's home. Anthony awoke to find defendant's tongue in his mouth and defendant's hands underneath his clothing, rubbing his penis.

(3) *Andrew O.* (counts three, four, and five, Pen. Code, § 288, subd. (a), lewd act upon a child, Pen. Code, § 288, subd. (b)(1), forcible lewd act upon a child). When Andrew was about 12 years old, he spent the night at defendant's apartment. Defendant sexually assaulted Andrew a number of times that evening. While Andrew was playing video games, defendant disrobed Andrew, grabbed Andrew, and then removed Andrew's clothes. Defendant put Andrew on the bed and forcibly sodomized him. Defendant then went to his computer and showed Andrew a "nasty" video of a nude man and a nude woman doing things that were "not right." Defendant forced Andrew to watch the video, even though Andrew kept trying to turn his face away from the screen. As the video game played, defendant touched Andrew's penis. Defendant turned off the video and pushed Andrew onto the bed and sodomized him again. Andrew eventually was able to go into the shower "to clear off the stuff that [defendant] put on [him]." However, defendant barged into the bathroom, entered the shower and placed his finger in Andrew's anus. Afterwards, Andrew was dressing when defendant grabbed and forcibly sodomized him again. When defendant went to sleep, Andrew tried to make a telephone call; defendant put Andrew back on the bed and put his hand and then his mouth on Andrew's penis. Defendant sodomized Andrew again.

(4) *S.N.* (count six, Pen. Code, § 261, subd. (a)(2), forcible rape).

When S.N. was 16 years old, she stayed the night at defendant's apartment. They both changed into sleeping attire. While S.N. was watching movies, defendant gave S.N.

a margarita to drink. He then forcibly raped her. At the time of trial, S.N. was 18 years old.

(5) *Other evidence.*

I.H. is defendant's younger sister by 6 or 7 years. She was 28 years old at the time of trial. She testified that on numerous occasions, when she was between the ages of 6 and 10, defendant touched and kissed her ear, neck, face, and mouth, and tried to put his tongue in her mouth. He also put his hand under her dress and digitally penetrated her vagina. When she was 10 years old, defendant raped her. Defendant lived in the same household with I.H when I.H. was about 12 years old. She estimated that defendant kissed and fondled her vaginal area on more than 20 occasions before he moved away from the family home. When I.H. was about 15 or 16, I.H. told the police about the sex crimes. Defendant was arrested, but the case was ultimately dropped.

After defendant was arrested, the police searched his home and found a computer hard drive containing more than 5,500 pornographic and sexually explicit images. The trial court permitted the introduction of 21 of these images.

B. *Defense.*

Defendant, who was born in 1970, testified in his own defense. He denied all of the charges. He admitted that when he was 12 and S.N. was about 6, he asked to see S.N.'s private parts, pulled down her bikini bottom, and exposed her bottom. He also testified that when he was about 12 or 13, he was curious so he undressed himself and I.H., repeatedly climbed on top of her, grinded himself on her, and ejaculated on her. He denied there was penetration. He stopped physically touching I.H. because he realized what he was doing was wrong.

C. *The conviction.*

Defendant was convicted on three counts of committing a lewd act upon a child (Pen. Code, § 288, subd. (a)), two counts of forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1)), and one count of forcible rape (Pen. Code, § 261, subd. (a)(2)). The jury further found all of the enhancement allegations true. (Pen. Code, § 667.61, subds. (b), (c), (e)(5).) Defendant was sentenced to state prison for a total of 70 years to life.

The sentence included the imposition of the upper term on count three. In addition to other fines and orders, the court imposed a restitution fine and a DNA penalty assessment pursuant to Government Code section 76104.7. After imposing sentence, the trial court directed that defendant have no contact with any of the victims.

Defendant appealed from the judgment.

III.

DISCUSSION

A. *The trial court did not abuse its discretion in admitting sexually explicit images.*

Defendant contends there was reversible error because the trial court admitted 21 of the more than 5,500 images recovered on his computer. We hold that the trial court did not abuse its discretion in admitting the images.

1. *Additional facts.*

The police discovered about 5,500 images on defendant's computer's hard drive that were pornographic, sexually explicit or of nude children. The hard drive was not in the computer, but inside a small box in his bathroom. The pictures depicted anal sex, objects inserted into anuses, explicit pictures of female genitalia, young naked girls, and young naked boys. The images of nude boys were attached to an email defendant had sent to his aunt.

Prior to trial, the prosecutor filed a motion pursuant to Evidence Code section 1101, subdivision (b) seeking to admit some of the photographs recovered on defendant's hard drive. Defense counsel objected, arguing that the images were inadmissible as they were not relevant to motive and intent. The trial court directed the prosecution to reduce the number of photographs it would seek to introduce under *People v. Memro* (1995) 11 Cal.4th 786. At this, and a subsequent hearing, defense counsel argued the images were not relevant because they were not similar to the sex acts described by the victims, particularly because the images of anal sex were between consenting adults and because

only a small number of the photographs were of anal sex, out of the thousands of photographs discovered.

The trial court permitted the introduction of 21 photographs; 7 photographs showed under age young, nude girls exposing their vaginas and anuses; 4 depicted nude boys, girls, and women, apparently in a nudist colony; and 10 photos were of sodomy, some of which showed items such as fruits and vegetables in a women's anus. The photographs were stored in different folders on the hard drive labeled "Lolitas," "ass-fuck," and "teach-my-ass dot com". The court concluded that the 21 photographs identified by the prosecutor were "admissible circumstantial evidence to show an obsession with the subject matter and [the prosecutor could argue defendant graduated]. He carried out the images he was living with . . . ."

Dr. Marty Klein, a licensed marriage and family therapist with a doctorate degree in human sexuality, testified as an expert for the defense. In part, he testified to the following: There was no established link between the use of pornography and anti-social behavior or acting out. "[T]here simply isn't very much data to suggest that there is a lot of impact on people's behavior from consuming pornographic images." "[O]nly one study of all the studies that have been done, suggest[s] there is a slight correlation between consuming certain kinds of [pornographic] images and certain kinds of behavior . . . ." Pornography cannot be a predictor of future behavior because more than 50 million people in America regularly use pornography. Possession of pornography shows what excites a person, but does not typically show what a person does in real life.

In cross examination, Dr. Klein testified that child molesters sometimes used pornography to "groom" their victims, i.e., to give the children the idea that the behavior was acceptable. He admitted that a small minority of people who possessed pornography acted out in sexually deviant ways. During this testimony, the trial court clarified for the jury that Dr. Klein was testifying that "[p]ornography is not a predictor of future behavior. The jury will decide – they could even ignore all of this or just go with other evidence. It's going to be up to them."

Defendant testified that his career goal was to be a filmmaker and videographer. He also testified to the following: He was interested in erotic photography, which he began to download from the internet onto his computer's hard drive in 2002. "Teachmyass.com," "Lolita," and "Ass fuck" were the names of the web sites from which he downloaded the material. He kept the images because he was interested in female sexual anatomy and erotic photography. He kept the images he thought were bizarre, but not because they were "titillating". He maintained the images on a separate hard drive for editing and safety. About 30 images were of young boys from a nudist web site. He denied finding sodomy titillating.

2. *Discussion.*

Defendant contends the trial court committed reversible error by admitting the 21 photographs because they did not replicate the crimes. In raising this argument, defendant notes that the hard drive yielded more than 5,500 images, most were of women, only a small number were of prepubescent boys and girls, only 10 depicted people having anal sex and these involved male-to-female interaction between adults, and those that did involve anal penetration involved a sex toy. Defendant also notes that there were no photographs of male-to-male or male-to-boys sexual acts and none showed coercion or violence.

"In general, 'evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.' (Evid. Code, § 1101, subd. (a).) Such evidence is admissible, however, 'when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.' (*Id.*, subd. (b).)" (*People v. Page* (2008) 44 Cal.4th 1, 40.)

"In certain circumstances, evidence of sexual images possessed by a defendant has been held admissible to prove his or her intent. In *People v. Memro*[, *supra,*] 11 Cal.4th 786 (*Memro*), the defendant was charged with first degree felony murder based upon a violation of [Penal Code] section 288, which prohibits the commission of a lewd and lascivious act upon a child who is under the age of 14 years. The defendant in *Memro* enjoyed taking photographs of young boys in the nude, and he had escorted his victim, seven years of age, to the defendant's apartment with the intent of taking photographs of the victim in the nude. When the victim said he wanted to leave, the defendant strangled him and attempted to sodomize his dead body. The trial court admitted magazines and photographs possessed by the defendant containing sexually explicit stories, photographs, and drawings of males ranging in age from prepubescent to young adult. [The Supreme Court] concluded the trial court did not abuse its discretion, because 'the photographs, presented in the context of defendant's possession of them, yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction. [Citation.] The photographs of young boys were admissible as probative of defendant's intent to do a lewd or lascivious act with [the victim].' [Citations.]" (*People v. Page, supra,* 44 Cal.4th at p. 40.)

Here, the admitted photographs, which we have examined, can support a conclusion that defendant was sexually aroused by sodomy and prepubescent girls and boys. They support an inference that defendant sought to gratify these sexual desires through his illegal acts. Additionally, Dr. Klein testified that sometimes child molesters use pornography to "groom" their child victims, i.e., the perpetrators show pornography to their child victims to give the children the idea that the behavior is acceptable. This is consistent with Andrew's testimony that while he was sexually assaulted by defendant, defendant forced him to view images on defendant's computer. Thus, even though the admitted photographs did not depict precisely the sexual acts described by the victims, they were relevant to show defendant's motive and intent.

Citing Evidence Code section 352, defendant also argues the images were inflammatory, and impermissibly allowed the jury to conclude he was a "bad" person.

However, the trial court severely restricted the number of photographs shown to the jury as only 21 of the more than 5,500 images were admitted, and the victim's descriptions of the crimes were more inflammatory than the photographs, or the captions on the images. (E.g., *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [decreased potential for prejudice when evidence of uncharged acts was no more inflammatory than the charged offenses].)[1]

We also find unpersuasive defendant's argument that the introduction of the images resulted in an undue consumption of time because it took defense counsel months to find an expert to respond to them. Any delays occurred before, and not during trial.

Lastly, even if the photographs were improperly admitted, defendant cannot demonstrate their admission was prejudicial to him. (*People v. Watson* (1956) 46 Cal.2d 818, 836; e.g., *People v. Page, supra,* 44 Cal.4th at pp. 41-46 [no prejudice from introducing pornographic images].) The prosecutor's references to the images were brief both in closing statement and rebuttal, the testimony of the victims was clear and strong, and the jury found defendant's testimony not believable. Thus, there is no reasonable probability that the verdict would have been more favorable to defendant had the images not been admitted.

B. *The trial court did not have the sua sponte obligation to instruct that the images were admitted for a limited purpose*.

After concluding that the 21 images could be presented to the jury, the trial court stated it would issue a limiting instruction. Upon reconsideration, the trial court stated it did not think such an instruction was required because the images were admissible pursuant to *Memro, supra,* 11 Cal.4th 786. The trial court asked defense counsel to present points and authorities on the issue. The defense counsel did not raise the issue again and did not submit any points and authorities. At the end of trial, the trial court did not issue a limiting instruction.

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[1] *People v. Ewoldt, supra,* 7 Cal.4th 380 was superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.

Defendant argues the trial court erred in not instructing, sua sponte, that the computer images were admitted for a limited purpose. However, trial courts generally do not have the duty to instruct sua sponte on the limited admissibility of evidence. (*People v. Collie* (1981) 30 Cal.3d 43, 63-64; *People v. Ochoa* (1998) 19 Cal.4th 353, 411.) This obligation arises only in the "occasional extraordinary case in which unprotected evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Collie*, *supra,* at p. 64.)

Here, the images were not a dominant part of the evidence presented, but they were highly relevant. For example, the images supported the conclusion that defendant used them to "groom" Andrew into believing that the sexual acts defendant was performing were normal. Thus, the images were reflective of defendant's intent and motive. Additionally, in closing and rebuttal arguments the prosecutor did not focus on the images. Rather, the prosecutor simply stated that the images were circumstantial evidence that appellant was a "sexual deviant" and "used Andrew to fulfill the sodomy fantasy." Further, during Dr. Klein's testimony, the trial court issued an instruction to the jury that it did not have to consider the images. The trial court informed the jury that it did not have to give any weight to the images, as the jury was free to "ignore all of this or just go on other evidence."

Thus, the trial court did not have the obligation to instruct sua sponte on the limited use of the images because this evidence did not dominate the trial, the trial court did inform the jury that it did not have to rely on the evidence, and the images were highly relevant.

C. *The admission of other crime evidence did not violate Evidence Code section 352.*

Prior to trial, the prosecutor made a motion to admit testimony from I.H. The trial court weighed the evidence and concluded that the evidence was highly relevant and admissible. Defendant contends the trial court abused its discretion in admitting other crimes evidence relating to I.H. This contention is not persuasive.

Evidence Code section 1108, originally enacted in 1995 (Stats. 1995, ch. 439, § 2), specifically addresses evidence of prior sexual offenses in criminal actions involving sexual offenses. It expands the admissibility of disposition or propensity evidence in sex offense cases. (*People v. Abilez* (2007) 41 Cal.4th 472, 502; *People v. Falsetta* (1999) 21 Cal.4th 903, 916, 917.) This provision " ' "permits courts to admit such evidence on a common sense basis -- without a precondition of finding a 'non-character' purpose for which it is relevant -- and permits rational assessment by juries of evidence so admitted. This includes consideration of the other sexual offenses as evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense." ' [Citation.]" (*People v. Falsetta, supra,* at p. 912.)

Evidence Code section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code s]ection 1101, if the evidence is not inadmissible pursuant to [Evidence Code s]ection 352."

Thus, our task is to decide if the probative value of the evidence relating to I.H. was " substantially outweighed by the probability that its admission [necessitated] undue consumption of time or [created] substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) We review a trial court's Evidence Code section 352 determination for abuse of discretion. (*People v. Falsetta, supra,* 21 Cal.4th at pp. 917-919; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Here, the evidence elicited from I.H. was highly relevant. It was consistent with the evidence relating to the charged offenses that defendant committed acts against young, vulnerable, relatives with whom he had frequent contact. It demonstrated that defendant was sexually attracted and abused both boys and girls. The acts committed against I.H. were similar to the charged offenses as they involved digital penetration, manipulation, and rape. The reliability of the evidence was enhanced because I.H. had

reported the events to the police prior to defendant being charged with the present crimes. Additionally, the testimony by I.H. was no more damaging than the testimony of the victims.

Thus, the trial court did not abuse its discretion in admitting the evidence relating to I.H.

D. *The trial court's examination of defense witnesses did not deny defendant due process.*

Defendant presented in defense his aunt (Della Niblett), his uncle (John Niblett), and Dr. Klein. During their testimony, the trial court asked some questions. For example, Della Niblett testified she never observed defendant acting inappropriately with Della's daughter, who was the same age as S.N. The trial court then asked Della if she was with defendant every minute of every day.[2]

Defendant contends he was denied due process when the trial court injected itself into the examination of these witnesses. Defendant asserts that by the court's questions, the court aligned itself with the prosecution, minimized the value of the defense testimony, and questioned the credibility of his witnesses. After examining the questions, and those posed by the trial court to the prosecution witnesses, we cannot conclude that the trial court overstepped its power.

Article VI, section 10 of the California Constitution states in pertinent part: "The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." "Evidence Code section 775 ' " 'confers upon the trial judge the power, discretion and affirmative duty . . . [to] participate in the examination of witnesses whenever he [or she] believes that [the judge] may fairly aid in eliciting the truth, in preventing misunderstanding, in clarifying the testimony or covering omissions, in allowing a witness his [or her] right of explanation, and in eliciting facts material to a just

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[2] Dr. Jeffrey Younggren, a forensic and clinical psychologist, also testified for the defense on traumatic memory and child sexual abuse.

determination of the cause.' " [Citation.] . . . The trial judge's interrogation "must be . . . temperate, nonargumentative, and scrupulously fair. The trial court may not . . . withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." [Citation.]' [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 350.) Courts are to "exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment." (Evid. Code, § 765, subd. (a).) However, courts may not become an advocate for either party. (*People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567.) "We determine the propriety of judicial comment on a case-by-case basis in light of its content and the circumstances in which it occurs. [Citation.]" (*People v. Cash* (2002) 28 Cal.4th 703, 730.)

Here, the court's questions posed to Della Niblett, John Niblett, and Dr. Klein were nonargumentative, reasonable, short, and often intended to clarify the testimony or expedite the trial. Further, the trial court demonstrated its neutrality by asking questions of seven prosecution witnesses. The questions directed to the prosecution witnesses were often more extensive and probing than the questions asked of the defense witnesses. Additionally, prior to, and after the trial, the court instructed the jury that it was not to take the court's comments or questions as an indication of what the court thought about the witnesses or evidence. We must assume the jury followed these instructions.

Thus, we find no misconduct by the trial court.

E. *The no contact order must be modified.*

At the close of the sentencing hearing, the trial court ordered defendant "not [to] have any physical or verbal contact with any of the victims in this case." Defendant contends the trial court had no authority to issue the no contact order.

The issue raised focuses on Penal Code section 1202.05. This statute permits a trial court to prohibit child victims of sexual offenses who are under the age of 18 from visiting in prison the perpetrators of the abuse.[3]

The Attorney General concedes that the trial court had no authority to impose the no contact order with regard to S.N., and the order must be modified with regard to Angel, Anthony, and Andrew.

We accept the Attorney General's concession that because S.N. was over the age of 18, the court could not issue the no contact order as to her. Further, we accept the Attorney General's concession that with regard to Angel, Anthony, and Andrew the order was over broad as it prohibiting *all* contact with defendant and was not limited to personal visits in prison. Therefore, we will strike the no contact order as to S.N. and direct that the order be modified with regard to Angel, Anthony, and Andrew.

F. *The trial court did not violate defendant's constitutional rights by imposing the upper term on count three.*

Defendant contends he was denied his constitutional rights because the trial court imposed the upper term on count three based on facts that were neither admitted nor found true by a jury. (*Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*); *Blakely v. Washington* (2003) 542 U.S. 296 (*Blakely*); *Cunningham v. California* (2006) 549 U.S. 270 (*Cunningham*).) We find no error.

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[3] Penal Code section 1202.05 provides in part: "[w]henever a person is sentenced to the state prison . . . for violating Section 261, 264.1, 266c, 285, 286, 288, 288a, 288.5 or 289, and the victim of one or more of those offenses is a child under the age of 18 years, the court shall prohibit all visitation between the defendant and the child victim." In enacting this statute, the Legislature explained that such no contact orders are necessary to "protect minor victims of sexual abuse from further psychological or emotional damage resulting from premature or counter-therapeutic contact with their abusers who are inmates in the state prison[. Thus,] there should be no visitation between the defendant incarcerated in state prison for sexual abuse and the child victim unless a juvenile court finds that such visitation is in the best interests of the child victim." (Stats. 1992, ch. 1008, § 1.)

1. *Additional facts.*

Defendant was convicted of three counts on committing a lewd act upon a child (Pen. Code, § 288, subd. (a), counts one, three, and four), two counts of forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1), counts two and five), and one count of forcible rape (Pen. Code, § 261, subd. (a)(2), count six). The jury found defendant guilty on all counts. The jury further found all of the enhancement allegations true. (Pen. Code, § 667.61, subds. (b), (c), (e)(5).) The sentencing hearing was held on December 27, 2007. On counts one, two, five, and six, the trial court sentenced defendant to mandatory, consecutive 15-year-to-life sentences pursuant to Penal Code section 667.6, subdivision (d). The court also sentenced defendant to the high term of eight years on count three, referring to Senate Bill No. 40, and two years on count four (one-third the mid-term). In imposing sentence, the court state that even if it had discretion, it would sentence defendant to consecutive sentences because the crimes involved a high degree of cruelty (Cal. Rules of Court, rule 4.421(a)(1)), the victims were particularly vulnerable (Cal. Rules of Court, rule 4.421(a)(3)), the crimes involved planning and sophistication (Cal. Rules of Court, rule 4.421(a)(8)), the defendant posed a great danger to society (Cal. Rules of Court, rule 4.421(b)(1)), and the crimes were independent and occurred at different times (Cal. Rules of Court, rule 4.425 (a)(1) & (a)(3)). The total sentence imposed was 70 years to life.

2. *Discussion.*

In *Apprendi, supra,* 530 U.S. at page 490, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (See also, *Washington v. Recuenco* (2006) 548 U.S. 212, 216.) "In *Blakely*, the high court extended the rule established in *Apprendi* to the State of Washington's determinate sentencing law, under which a sentence within the ' "standard range" ' must be imposed unless the trial court finds aggravating factors that justify an ' "exceptional sentence." ' [Citation.] . . . [¶] . . . [¶] The United States Supreme Court has recognized two exceptions to a defendant's Sixth Amendment right to a jury trial on

an aggravating fact that renders him or her eligible for a sentence above the statutory maximum. First, a fact admitted by the defendant may be used to increase his or her sentence beyond the maximum authorized by the jury's verdict. [Citation.] Second, the right to jury trial and the requirement of proof beyond a reasonable doubt do not apply to the aggravating fact of a prior conviction. [Citations.]" (*People v. Sandoval* (2007) 41 Cal.4th 825, 835-837, citing among others, *Blakely, supra*, 542 U.S. at pp. 299, 301, 303 and *Apprendi, supra*, at p. 490.)

In *Blakely*, the United States has also clarified that the "statutory maximum" "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he [or she] may impose *without* any additional findings." (*Blakely, supra*, 542 U.S. at pp. 303-304; see also, *Washington v. Recuenco, supra*, 548 U.S. at p. 216.)

In *Cunningham, supra*, 549 U.S. 270, the United States Supreme Court held that the version of California's determinate sentencing law (DSL) then in effect violated "a defendant's federal constitutional right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution by assigning to the trial judge, rather than the jury, the authority to make factual findings that subject a defendant to the possibility of an upper term sentence." (*People v. Black* (2007) 41 Cal.4th 799, 805; *People v. Sandoval, supra*, 41 Cal.4th at pp. 831-832.)

In the wake of *Cunningham*, "[t]he California Legislature quickly responded" by amending the law to rectify the constitutional defects identified in *Cunningham*. (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.) "Senate Bill No. 40 (2007-2008 Reg. Sess.) (Senate Bill 40) amended [Penal Code] section 1170 in response to *Cunningham's* suggestion that California could comply with the federal jury-trial constitutional guarantee while still retaining determinate sentencing, by allowing trial judges broad discretion in selecting a term within a statutory range, thereby eliminating the requirement of a judge-found factual finding to impose an upper term. [Citations.] Senate Bill 40 amended section 1170 so that (1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to impose an upper, middle or lower term based on

reasons he or she states. As amended, section 1170 now provides as pertinent: 'When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . .' (§ 1170, subd. (b).) This amended version of section 1170 became effective on March 30, 2007. (Stats. 2007, ch. 3, § 2.)" (*People v. Wilson, supra,* at p. 992.)

Because the amended version of the statute was in effect when defendant was sentenced on December 27, 2007, *Cunningham* is inapplicable and imposition of the upper term on count three was constitutionally sound. The trial court stated its reasons for imposition of the upper term, as described above. Accordingly, "[t]he trial court's sentencing of defendant in compliance with the requirements of [the current version of Penal Code] section 1170, subdivision (b), did not violate [his] federal constitutional rights . . . ." (E.g., *People v. Wilson, supra,* 164 Cal.App.4th at p. 992.)

Even if an error occurred under *Blakely/Cunningham,* it may be harmless if we can determine from the record that had the question been submitted to the jury, the jury would have found true at least one factor authorizing an upper term sentence. (*Washington v. Recuenco, supra,* 548 U.S. 212; *People v. Sandoval, supra,* 41 Cal.4th at pp. 838-839; *Chapman v. California* (1967) 386 U.S. 18.) In conducting this analysis, however, we "cannot necessarily assume that the record reflects all of the evidence that would have been presented had aggravating circumstances been submitted to the jury. . . . [¶] . . . [¶] Additionally, to the extent a potential aggravating circumstance at issue in a particular case rests on a somewhat vague or subjective standard, it may be difficult for a reviewing court to conclude with confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court." (*People v. Sandoval, supra,* at pp. 839-840.)

Here, the aggravating factors cited by the trial court at sentencing were objective and could not have been assessed differently by the jury. Defendant sexually assaulted

four, young, vulnerable victims, all of whom were relatives. (Cal. Rules of Court, rule 4.421(a)(3).) Defendant's acts involved a high degree of cruelty in light of the probable life-time scarring to the victims. (Cal. Rules of Court, rule 4.421(a)(1).) Defendant used the purported safety zone of his house to carry out many of his crimes, gave S.N. alcohol, and used sexually explicit images to "groom" Andrew; these facts demonstrate that the crimes involved planning and sophistication. (Cal. Rules of Court, rule 4.421(a)(8).) Given the number of victims and their ages, and the types of crimes, defendant posed a great danger to society. (Cal. Rules of Court, rule 4.421(b)(1).) Additionally, the crimes were independent and occurred at different times. (Cal. Rules of Court, rule 4.425(a)(1) & (3).) We have no doubt that had these aggravating factors been submitted to the jury, it would have authorized the imposition of the upper term. Thus, it is beyond a reasonable doubt that a jury presented with evidence of any of the aggravating factors in this case would have returned true findings on those factors, rendering any error by the sentencing court harmless. (*Washington v. Recuenco, supra,* 548 U.S. 212; *People v. Sandoval, supra,* 41 Cal.4th at pp. 838-839; *Chapman v. California, supra,* 386 U.S. 18.)[4]

G. *The trial court improperly imposed a DNA penalty assessment fine, but it properly imposed a $1,000 restitution fine.*

Defendant contends the trial court lacked the statutory authority to impose the DNA penalty assessment pursuant to Government Code section 76104.7 and the restitution fine.

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[4] Thus, we need not address defendant's argument that the imposition of the upper term on count three violated his constitutional rights because of the lack of procedures in California. This argument is premised upon the fact that California does not have a statutory procedure for submission to the jury of the issue as to whether aggravating facts exist. (Cf. *Washington v. Recuenco, supra,* 548 U.S. 212.)

1. *We accept the concession by the Attorney General that the DNA assessment must be stricken.*

The Attorney General concedes that the trial court could not impose the $20 DNA assessment because Government Code section 76104.7 became effective on July 12, 2006, after defendant committed his last crime. (Stats. 2006, ch. 69, § 16, eff. July 12, 2006.) Thus, the imposition of this penalty violated ex post facto principles. (*People v. Alford* (2007) 42 Cal.4th 749, 757-758; *People v. Batman* (2008) 159 Cal.App.4th 587 [discussing ex post facto challenge to DNA penalty assessment, Gov. Code, § 76104.6].)

2. *We may correct the court's clerical error with regard to the restitution fine.*

In imposing the $1,000 fine, the trial court stated on the record that it was imposing a "restitution fine for child abuse prevention under [Penal Code section] 294 . . . ." In comparison, the minute order and the abstract of judgment, identified the fine as being imposed under Penal Code section 288, subdivision (e).

With regard to the $1,000 fine, defendant contends it was unauthorized pursuant to Penal Code section 294. Penal Code section 294, subdivision (b) reads in relevant part: "Upon conviction of any person for a violation of Section 261, 264.1, 285, 286, 288a, or 289 where the violation is with a minor *under the age of 14 years*, the court may, in addition to any other penalty or restitution fine imposed, order the defendant to pay a restitution fine . . . ." (Italics added.) As defendant notes, the only possible conviction that could satisfy Penal Code section 294, was the forcible rape of S.N., a violation of Penal Code section 261, subdivision (a)(2). However, S.N. was 16 at the time of the crime, and thus, as defendant argues and the Attorney General concedes, a penalty restitution fine could not be imposed pursuant to section 294.

Such a fine, however, would be proper under Penal Code section 288, subdivision (e). It states in part: "[u]pon the conviction of any person for a violation of subdivision (a) or (b), the court may, in addition to any other penalty or fine imposed, order the defendant to pay an additional fine not to exceed ten thousand dollars ($10,000)."

Defendant was convicted on three counts of Penal Code section 288, subdivision (a) and two counts of Penal Code section 288, subdivision (b).

We acknowledge the general rule that if there is a discrepancy between an oral pronouncement and the minute order or the abstract of judgment, the oral pronouncement prevails. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) However**,** courts have the inherent power to correct clerical errors on their own motion. This includes correcting an erroneous sentence if the oral pronouncement is contrary to the court's intention. (*People v. Menius* (1994) 25 Cal.App.4th 1290, 1294 [obvious inadvertent misstatement by trial court in referring to wrong subdivision of statute corrected]; *People v. Jack* (1989) 213 Cal.App.3d 913 [correction where trial court misspoke]; *People v. Schultz* (1965) 238 Cal.App.2d 804, 808 [clerical error corrected where trial court misspoke].)

Here, it is clear that the trial court wished to impose a $1,000 restitution fine. Thus, even though the court's oral pronouncement cited to the wrong statute, the imposition of the fine was proper under Penal Code section 288, subdivision (e). Therefore we will affirm the imposition of the fine under Penal Code section 288, subdivision (e), as properly indicated in the minute order and abstract of judgment.

IV.

DISPOSITION

We order the trial court to strike the no contact order as it applied to S.N. and to modify the no contact order as it applied to Angel, Anthony, and Andrew, such that it prohibits personal contact by these victims with defendant while defendant is incarcerated. In addition, we order the trial court to strike the $20 DNA penalty assessment. We direct the trial court to modify the abstract of judgment accordingly. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, ACTING P. J.

KITCHING, J.